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Supreme Court, U.S.
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NO. 01-1687

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK J. GRIFFIN, III,
Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Reply Brief in Support of Petition for Writ

The petition in this case presents fundamental issues of First Amendment law. What is a viewpoint-based speech restriction? How does such a restriction differ from a legitimate subject matter exclusion? When is the criterion for identifying excludable speech in a nonpublic forum so vague and subjective that it violates the First Amendment? Do the *Shuttlesworth* vagueness standards applicable in a public forum apply in a nonpublic forum?

The petition raises equally fundamental questions about government speech. Does a nonpublic forum send a governmental message? If so, what is the message? Can the government speech doctrine apply in the absence of a traditional communicative act by the government, such as a radio broadcast or the display of a sign?

The Solicitor General opposes the petition on grounds that amount to little more than repeating the flawed reasoning of the court of appeals. Nowhere does the Solicitor make any argument that suggests that the issues described above are not presented here. The Court therefore should grant certiorari and resolve the major First Amendment issues this case raises.

I. The Petition Presents the Opportunity for the Court to Clarify the Distinction Between Legitimiate Subject-Matter Exclusion and Illegitimate Viewpoint-Based Exclusion in a Public Forum.

The Court has recognized that government may legitimately exclude subject matter from a nonpublic forum in order to preserve the forum for its intended use, but may not "'suppress expression merely because public officials oppose the speaker's view.'" *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 687 (1992) (O'Connor, J., concurring). The Court has also recognized that the distinction between legitimate subject-

matter exclusions and unconstitutional viewpoint discrimination "is not a precise one." *Rosenberger v. University of Virginia*, 515 U.S. 819, at 831 (1995).

The Fourth Circuit's holding on the issue of reasonableness "turns on" the "pivotal distinction" between speech that honors the Confederate dead "as Confederates" and speech that honors them "as Americans." *Griffin v. Dept. of Veterans Affairs*, 274 F. 3d 818, 822 (4th Cir. 2001). (Pet. App. B6.) The court reasons that 38 U.S.C. § 2403(c) limits speech at the Cemetery to that which honors the war dead, including Confederates, "as Americans." Id. 821 (Pet. App. B5). Speech that honors the Confederate dead "as Americans," however, appears to address the same "subject matter" as speech honoring those dead "as Confederates." The only difference between the two categories appears to be the "particular views taken by speakers on [the] subject." *Id.* at 829. If the difference is one of viewpoint, the Fourth Circuit holds that the VA's restrictions are reasonable *precisely because they exclude a disfavored viewpoint.*

A fundamental principle of First Amendment law, however, is that viewpoint discrimination in a nonpublic forum is unconstitutional. *Rosenberger,* 515 U.S. at 829-830. The petition therefore squarely presents fundamental constitutional issues: Is the "as Americans" vs. "as Confederates" distinction viewpoint-based? To resolve this issue, one must ask what is a viewpoint and what is a subject matter. If the difference is one of viewpoint, does the First Amendment allow government to establish a nonpublic forum exclusively for the expression of favored viewpoints?

The Solicitor fails to show that these issues are not presented. Instead, the Solicitor changes the subject, arguing (Opp. at 12-13), as the Fourth Circuit, held, 274 F.3d at 824 (Pet. App. B11), that the VA regulations actually confer an "advantage" on display of the

Confederate flag. But even if that were true, the "advantage" argument would not establish that the VA's regulations are viewpoint-neutral. It would only mean that the balance tips in favor of the Confederate flag over others. If the basis for the preference is viewpoint, it is still unconstitutional.

Moreover, the undisputed fact is that the VA denied Mr. Griffin's request to display the Confederate flag pursuant to its 363-day ban on such displays. Mr. Griffin suffered damage (*i.e.*, he was unable to speak) and therefore has challenged this application of the ban to him. Whether the VA's speech regulations *as a whole* favor speech that honors the Confederate dead "as Confederates" is irrelevant to Mr. Griffin's *as-applied challenge to the 363-day ban*. If the ban is based on viewpoint, Mr. Griffin is entitled to prevail on his *as-applied challenge* regardless of whether the VA's regulations as a whole exhibit a preference for display of the Confederate flag over others.

The notion that the VA exhibits a "preference" for display of the only flag it bans 363 days a year is nonsensical. As shown in Mr. Griffin's petition (at 4-6), the VA subjects display of the Confederate flag to (1) an outright ban 363 days a year (Pet. App. D9, ¶ 7a); (2) an organizational sponsor requirement (Pet.App. D10, ¶ 7c.); and (3) a deviation procedure to the extent an individual seeks to display the Confederate flag at any time, or an approved organizational sponsors seeks to display the flag more than two days a year (Pet. App. D4, ¶ 2b.). *No other flags are subjected to these restrictions*. Indeed, if the "advantage" argument were correct, a party could bring an action to impose the "advantage" of a 363-day ban on non-Confederate flags.

The Solicitor argues (Opp. at 12-13) that the VA's restrictions on the Confederate flag are "consistent with Congress' neutral objective of honoring all those buried at national cemeteries *'as Americans.'*" But the intent of Congress does not trump the First

Amendment. If the "as Americans" vs. "as Confederates" distinction is viewpoint-based, Congress' "objective" in establishing the distinction and the statute it uses to achieve that objective, 38 U.S.C. § 2403(c), are not "neutral." They are unconstitutional viewpoint discrimination. Invoking the intent of Congress or a statute thus does not moot the issue of viewpoint discrimination.

The Solicitor's remaining arguments (Opp. at 13-14) relate to deference to administrative and district-court fact-finding. Whether or not deference to administrative determinations is appropriate in First Amendment cases, and regardless of whether the Fourth Circuit properly deferred to the district court's findings, the VA's regulations are still unconstitutional if they are viewpoint-based. The viewpoint issue thus is still presented, even if the Solicitor's arguments are correct.

II. THE PETITION RAISES THE ISSUE OF WHETHER THE FOURTH CIRCUIT'S "PIVOTAL DISTINCTION" IS UNCONSTITUTIONALLY VAGUE.

The Fourth Circuit holds that a VA official may draw a line between speech that honors the Confederate dead "as Americans" and speech that honors them "as Confederates" and restrict the latter, including display of the Confederate flag. The court's holding in regard to reasonableness turns on this "pivotal distinction." This Court has held that a law that confers such broad and vaguely defined powers on government officials to categorize and punish speech violates the First Amendment in a nonpublic forum. *Board of Airport Comm. v. Jews for Jesus*, 482 U.S. 569, 576 (1987).

The Solicitor (Opp. at 14) argues that the Court should not address the vagueness of the Fourth Circuit's "pivotal distinction" because the court "did not pass on that question...." This argument

makes no sense. By the Solicitor's logic, if the court of appeals announces an unconstitutional rule of law and in so doing ignores that the rule is unconstitutional, this Court must sit by helplessly because the court of appeals did not "pass" on the constitutional question.

The cases the Solicitor cites do not support his position. In both *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001) and *NCAA v. Smith*, 525 U.S. 459, 470 (1999), a party sought to raise for the first time in the Supreme Court arguments the party could have raised in the court of appeals but did not. Here, by contrast, the Fourth Circuit first announced its "pivotal distinction" in the very decision Mr. Griffin challenges.

The Solicitor argues (Opp.at 14-15) that the vagueness issue was addressed in Mr. Griffin's Federal Circuit case, *Griffin v. Secretary of Veterans Affairs*, 288 F. 3d 1309 (Fed. Cir. 2002), petition for cert. pending, Case No. 01-1782 (filed May 30, 2002) and therefore should not be addressed here. This argument too makes little practical sense. Mr. Griffin was forced (Pet. App. C6-8) to bring his facial challenge to 38 C.F.R § 1.218(a)(14) in the Federal Circuit, which has exclusive jurisdiction over such a challenge. *See* 38 U.S.C. § 502. Whether *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969) applies in a nonpublic forum is an issue in both cases. This question is of sufficient importance that the Court should grant review in both cases, consolidate them and decide whether § 1.218(a)(14) and the Fourth Circuit's "pivotal distinction" pass *Shuttlesworth* muster in a nonpublic forum.

III. THE COURT SHOULD GRANT REVIEW TO CLARIFY FUNDAMENTAL CONCEPTS IN ITS FIRST AMENDMENT FORUM ANALYSIS.

The Fourth Circuit's conclusion that the Confederate flag "garbles and distorts" the VA's "chosen message" is central to the court's holdings with respect to viewpoint neutrality and reasonableness. *Griffin* at 822, 824 (Pet. App. B8, 10.) Government may favor some viewpoints over others where government is itself the speaker. *See, e.g., Rosenberger*, 515 U.S. at 833. Government speech thus is critical to the entire decision below.

The government speech argument, however, finds no support in the record. Nothing in the record shows that the VA engaged in any recognized communicative act, such as a public radio broadcast, *Knights of the Ku Klux Klan v. Curators of the Univ. of Missouri*, 203 F. 3d 1085 (8th Cir.), *cert. denied*, 510 U.S. 992 (2000) or the posting of a sign, *Wells v. City ad County of Denver*, 257 F. 3d 1132 (10th Cir.), *cert. den.*, 122 S.Ct. 469 (2001) to communicate its purported "message." Nor does the record suggest that Mr. Griffin's flag display would interfere with any recognized form of speech by the VA. For example, no evidence was presented to the effect that Mr. Griffin's proposed Confederate flag display blocked the view of a VA plaque, sign or monument. What the VA says, how it says it and whether the Confederate flag "garbles and distorts" the VA's speech are questions of *fact*. But again, no facts in the record showed either speech by the VA or that Mr. Griffin's proposed flag display interfered with that speech.

In the absence of any support in the record, the Fourth Circuit simply stated that daily display of the Confederate flag "certainly 'garbles and distorts'" the VA's "chosen message." 274 F.3d at

822 (Pet. App. B8). At a minimum, this statement represents appellate fact-finding, a practice this Court has condemned. *Anderson v. City of Bessemer*, 470 U.S. 564, 573-575 (1985). If the district court's findings are inadequate, as the Fourth Circuit found, 274 F. 3d at 821-822 (Pet. App.B6), the court should have remanded the case to the district court with directions to make appropriate findings. *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 577 (4th Cir. 1985). But the Fourth Circuit did not remand. Instead it "found" facts that are nowhere in record.

The Fourth Circuit's opinion notes that the VA's purported "message" "coincides with the purpose" of the Cemetery. *Griffin* at 821 (Pet. App. B4). The court thus seems to "find" that *the Cemetery itself* is a communicative act by the VA that sends the VA's "chosen message." If the communicative act is not the Cemetery, the opinion below simply conjures an act of speech by the VA out of thin air.

Either way, and contrary to the Solicitor's argument (Opp. at 10-11), the Fourth Circuit's reasoning does not "faithfully follow" this Court's precedents or the decisions of other circuits. It is instead a radical – and dangerous – departure from precedent. It is radical because no court has held a forum, *i.e.*, a place where speech occurs, to be government speech. On the contrary, in *Arkansas Educ. Television Comm. v. Forbes*, 523 U.S. 666, 682 (1998), the Court treated a public television broadcast of a political debate as a forum for speech, not speech by the government. In *Rosenberger*, 515 U.S. at 834-35, the Court held that university funding of student speech created a "metaphysical" forum for private speech. The Court reached similar results *Board of Regents of the Univ. of Wisconsin System v. Southworth*, 529 U.S. 217, 230 (2000) and *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 543-44 (2001). The Fourth Circuit's treatment of the Cemetery as speech by VA (or alternatively its

finding government speech without any communicative act at all) is a major departure from this Court's precedents and cases in which other circuits uniformly have required a recognized communicative act by the government to invoke the government speech doctrine. *See PMG International Divison, L.L.C. v Rumsfeld*, __ F.3d __, 2002 WL 31041516 (9th Cir., Sept. 13, 2002.)(discussing cases and holding government's placement of magazines in stores at military bases did not constitute government speech).

The Fourth Circuit's holding is dangerous because under the court's reasoning every forum can be viewed as communicating a message, which disfavored private expression "garbles and distorts." Under the Fourth Circuit's approach, *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995) *Rosenberger* would have gone the other way because the Ohio capitol mall and the University of Virginia's forum for student speech can be viewed as sending a "message" of non-involvement with religion, which a cross display or a Christian publication "garbles and distorts." (*See* Pet. at 17-18.)

The Court's forum analysis works only if a sharp distinction is maintained between the forum and speech within the forum. If that distinction is blurred, the forum where private speech enjoys viewpoint protection becomes speech government may "protect" by silencing inconsistent viewpoints. If the distinction were blurred, as it is in the Fourth Circuit's opinion, the government speech doctrine would swallow up First amendment protections for private speech in all fora. To preserve the integrity of its forum analysis, the Court should only recognize government speech where the record shows (1) a "distinct and clear message"; (2) transmitted by a recognizable act of speech; (3) "an intent to speak"; and (4) reasonable success in actually reaching an audience with the message." *See* R.P. Bezanson and W.G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1436 (2001).

In his opposition (at 11), the Solicitor does not deny that the Cemetery is the purported "act of speech" on which the Fourth Circuit relies in finding government speech. Nor does the Solicitor identify any recognized act of speech by the VA with which Mr. Griffin's flag display interferes. These omissions are telling. In sum, Mr. Griffin's petition presents fundamental issues concerning the government speech doctrine. What is "speech" by the government? Can an arrangement of monuments, a flag, a sign or other things on government property send a message? If so, how does one know what the message is, prior to being arrested for "garbling and distorting" it? In deciding these and other issues of equal importance, the Court will be able to clarify its forum analysis and the government speech doctrine, both of which are of enormous importance to our most basic freedom, the right to speak.

CONCLUSION

For the reasons stated above, Mr. Griffin respectfully submits that his petition for certiorari should be granted.

Respectfully Submitted,

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